IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1816

ARTHUR F. TURCO, JR.,

Petitioner,

v.

THE MONROE COUNTY BAR ASSOCIATION, THE APPELLATE DIVISION OF THE SUPREME COURT, FOURTH JUDICIAL DEPARTMENT, JOHN S. MARSH, REID S. MOULE, RICHARD W. CARDAMONE, HARRY D. GOLDMAN, RICHARD D. SIMONS, WALTER J. MAHONEY, FRANK DEL VECCHIO, and G. ROBERT WITMER, Presiding Justice and Justices of the Appellate Division of the Supreme Court, Fourth Judicial Department, and LESTER FANNING, Chief Clerk of the Appellate Division of the Supreme Court, Fourth Judicial Department,

Respondents.

REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner submits this brief in reply to the responses submitted by the Monroe County Bar Association and the Appellate Division, as well as the Justices and Clerk thereof.

I.
RESPONDENT BAR ASSOCIATION HAS DISTORTED AND EVEN MISSTATED THE RECORD IN AN ATTEMPT TO MAKE IT APPEAR THAT PETITIONER HAD EFFECTIVELY ADMITTED TO HAVING COMMITTED HEINOUS CRIMES WHEN HE PLEADED GUILTY TO SIMPLE ASSAULT.

A major thrust of the respondent Bar Association's brief is its attempt to distort and even misstate the record in an effort to make it appear that petitioner had effectively admitted to having committed heinous crimes when he pleaded guilty to a simple assault.

By its attempt to suggest that there was such an admission -- as distinguished from an unproved, and indeed withdrawn, charge of murder in Maryland 1/ -- respondent hopes to overcome the major Due Process issue which is at the heart of this case. Since this seems to be the crux of the Bar Association's argument, it seems important that we analyze it in some detail and show how the Bar Association has misstated and distorted the record.

1/ There are also charges of considerably lesser impact arising out of the conviction in New York. The procedural issue arising from the denial of Due Process is essentially the same except that as to the New York proceedings even the Bar Association is "inclined" to accept the claim that Mr. Turco continued to protest his innocence despite his plea (Brief of Bar Assn., p. 11).

The essential procedural issue in this disbarment proceeding is the following: How did the Appellate Division proceed from the fact that Mr. Turco had pleaded guilty to a simple assault to a finding that he had committed a series of horrendous acts which justified disbarment?

Obviously, the Appellate Division expanded upon the conviction of the simple assault. Its responsibility under the New York law was to make an individualized determination as to whether a particular conviction of a misdemeanor established professional misconduct and, if so, what punishment should be imposed. What would have been the proper procedure for that individualized determination? Either a) it could have provided a procedure which had the essential elements of Due Process of law, as a result of which it could make viable findings that in fact the petitioner, who in the record had been convicted of a misdemeanor, had committed acts of such seriousness as to establish professional misconduct which merited disbarment, or b) it could rely on an admission.

The Appellate Division did not pursue the first of these alternatives. It made a finding of fact without the most elementary features of Due Process of law. The Bar Association, apparently aware that this was improper, attempts to shore up that finding by claiming it was based on an admission.

Throughout this litigation, petitioner has contended that he has not had a hearing providing the bare essentials of Due Process. And there

hardly seems much dispute about that. After all, with respect to the entire story of the murder, which appears in the Appellate Division's decision, pp. 46a-48a, and which is obviously the basis for the disbarment, not a single witness has given inculpatory testimony in any forum -- not the Maryland courts, nor any court of the State of New York, nor before the hearing officer -- and since there has been no inculpating testimony, there was obviously no confrontation.

Since a clear charge and proof thereon, including presentation of witnesses and the right of cross-examination, seem to be the minimal essentials of Due Process of law and the essence of a "day in court," which were lacking here, the question is, what else did the Appellate Division rely upon?

Petitioner's position all along has been that the Appellate Division relied upon disputed and unestablished assertions by a prosecutor as to what the government's case would be in Maryland. Since by definition it would be a denial of Due Process for the Appellate Division to base a finding of fact thereon, the respondent Bar Association has tried to distort the record to make it appear that the basis of the Maryland proceeding was an admission by Mr. Turco that he had participated in a murder.

We proceed to an analysis of the record.

At the outset it should be noted that in both the Maryland and the New York state courts plea bargaining is permitted and a plea may be accepted despite a clear assertion of innocence.

Regardless of whether the plea in this case would have satisfied the requirements of Rule 11 of the Federal Rules of Criminal Procedure, had the criminal proceedings been pending in federal court, the state courts involved here clearly permitted the acceptance of a plea because "reasons other than the fact that he is guilty may induce a defendant to so plead," State v. Kaufman, 51 Iowa 578, 580, 2 N.W. 275, 276 (1879), quoted in North Carolina v. Alford, 400 U.S. 25, 30 (1970).

In the Maryland proceedings, a plea bargain was made and the petitioner herein agreed to plead to a simple assault and on that basis the state agreed to drop all other charges. On presenting the plea, Mrs. O'Connor, the prosecuting attorney, was invited to state what it was she would present if the case had gone ahead to trial. She then recounted what various state witnesses would have testified on direct and the defendant (petitioner here) stipulated "that this is what the state's evidence will disclose on direct testimony." It is absolutely clear from the record that the stipulation went no farther than that and that there was no stipulation by the defendant as to the facts and no concession as to the truth or accuracy or the summary of proposed testimony.

Thereafter, counsel for the petitioner set forth what would have been presented on behalf of the defense. This presentation consisted of two portions: The first was a recitation of the testimony that would have been given by eight witnesses who would have established the defense of alibi. The second part of the defense was a statement

that Mr. Turco would personally take the stand and would testify as to his innocence.

It was at the point where defense counsel started moving into the second portion of this statement, namely, a reference to what Mr. Turco would personally have stated, that the prosecution raised an objection and it is an edited and thereby distorted portion of the ensuing colloquy that respondent Bar Association prints at the bottom of page 9 to the top of page 11 of its response.

The Bar Association omitted from its quotation the portion of the record which makes it absolutely clear that the only matter objected to by the prosecutor and the only matter withdrawn by the defense was a recitation of what Mr. Turco himself would testify to. This is shown by that portion of the transcript which immediately follows the quotation which appears in the Bar Association's response.

Directly after the statement by Mr. Kunstler, "I would agree to that," the record reads as follows:

> "(Proceedings at the bench were terminated.)
>
> THE COURT: Would the State please repeat its position made at the bench.
>
> MRS. O'CONNOR: The State would request that the portion of the transcript be deleted from the last witness stated by Mr. Kunstler,

> whom I believe was Mr. Clerk's [sic] testimony as Mr. Clark would give it, 2/ from there on out the State would request any testimony given by Mr. Turco, any reason asserted by Mr. Kunstler on behalf of Mr. Turco, be deleted from the record.
>
> MR. KUNSTLER: I have no objection.
>
> THE COURT: The record will disclose Mr. Turco individually is making no assertion concerning his own participation in the case. Is that correct?" (Transcript, Feb. 14, 1972, pp. 41-42.)

Reading the record in its entirety, it is unmistakeable that counsel was barred, apparently by the plea bargaining agreement, from stating what Mr. Turco's testimony would have been had he personally taken the witness stand but there was no objection to the inclusion within the record of all of the statements of the alibi witnesses, which of course directly contradicted the government witnesses' version of the facts.

Thus, when the Bar Association's response reads:

> "The Appellant [sic] Division relied on the summary of the prosecution's witnesses, to which petitioner had stipulated." (at p. 29; emphasis in original),

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2/ Mrs. O'Connor was in error in assuming that Mr. Clark was the last witness. He was but the fifth of the eight alibi witnesses.

the Bar Association is absolutely right in so far as it states that the Appellate Division relied on the summary of the testimony of the prosecution's witnesses; that is precisely what petitioner complains about. But the concluding phrase that petitioner had stipulated to the summary of testimony as fact is an unvarnished misstatement of the record.

This fundamental effort to misstate the record is at the core of this case. By this time, the Bar Association seems almost to acknowledge that unless it can squeeze out of this record an admission of the facts, there was no Due Process before the state court. That is the reason why it has distorted the record in the hope of making it appear that there was an admission.

II.

THE RESPONDENT BAR ASSOCIATION AND THE APPELLATE DIVISION IN ITS OPINION COMPLETELY IGNORE THIS COURT'S HOLDING IN IN RE RUFFALO, 390 U.S. 544 (1968).

We have focused until now upon the Maryland proceedings. The situation in respect to the New York proceedings is really quite different. As to those proceedings, as we have already pointed out, even the Bar Association was "inclined" to accept the claim that there was an assertion of innocence. 3/ Since there was no independent

3/ Inspection of the record in the New York court renders this conclusion absolutely inescapable.

proof in the disciplinary proceedings of the substance of the New York charges (and they were sharply disputed by petitioner), there could be no basis for a factual conclusion as to what the New York charges established.

For this reason, the Bar Association shifts gears when it deals with the New York proceedings. At pp. 13-15 of its brief there is extensive discussion of the "stay in Canada" and this, of course, is mentioned by the Appellate Division as in part a basis for its decision (61a-62a).

The Bar Association admits that this item was "not the basis of the Bar Association's charges against the petitioner" (p. 15) but nevertheless should be considered.

That is in direct conflict with this Court's holding in In re Ruffalo, 390 U.S. 544 (1968), when it said:

> "These are adversary proceedings of a quasi-criminal nature. Cf. In re Gault, 387 U.S. 1, 33, 18 L. ed. 2d 527, 549, 87 S. Ct. 1428. The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh.
>
> "How the charge would have been met had it been originally included in those leveled against petitioner by the Ohio Board of

Commissioners on Grievances and Discipline no one knows.

"This absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process." (At 551-52.)

III.

RESPONDENT BAR ASSOCIATION ARGUES THAT THERE IS NO CONFLICT BETWEEN THE CIRCUITS, WHEN THE CIRCUIT JUDGES ARE QUITE CLEAR THAT THERE IS.

The Bar Association baldly states:

> "There is no conflict between the Second Circuit and the Sixth Circuit on the issue presented by this record." (p. 16)

But this is directly disputed by Getty v. Reed, 547 F. 2d 971, 975 (6th Cir., 1977), where the court points out that it is in disagreement with the decisions of the Second Circuit. It is also contradicted by the concurring opinion of Judge Oakes of the Second Circuit in this case wherein he states that he believes there is a direct conflict between the Sixth and Second Circuits (15a-16a).

Even the Attorney General's brief in this case seems to acknowledge that there is a conflict, although he argues that the differences "have been greatly exaggerated and in any event

have no application herein" (p. 6).

IV.

RESPONDENT APPELLATE DIVISION'S ARGUMENT THAT "THE MERITS OF THE PETITIONER'S CONTENTIONS" HAVE BEEN REVIEWED FIVE TIMES AND THEREFORE DO NOT WARRANT FURTHER REVIEW BY THIS COURT IS NOT IN ACCORD WITH THE RECORD.

At pages 8 and 9 of the Appellate Division brief the argument is made that the merits of the petitioner's arguments have been reviewed and found wanting many times and that therefore this Court should not review the matter.

Of course, the whole point of the U.S. District Court decision and the Circuit Court decision was that they would not for jurisdictional reasons consider the case. Indeed, the Circuit Court indicated that it might, if it were reviewing the case, see some merit in some of the petitioner's contentions.

It is precisely because the petitioner has been prevented by jurisdictional obstacles from having a review of his case on the merits that he has limited the question presented to this Court to a review of the jurisdictional issue.

V.

RESPONDENTS ARE ARGUING FOR A COMPLETE NULLIFICATION OF THE ROLE OF THE FEDERAL COURTS IN THE SYSTEM OF ENFORCEMENT OF CONSTITUTIONAL RIGHTS WHENEVER A STATE COURT HAS DECIDED A CASE -- EVEN WHEN THE ISSUE INVOLVES THE CONSTITUTIONALITY OF THE PROCEDURES OF THE STATE COURT.

The reliance of the Bar Association on the case of Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923), frankly seeks to turn the clock back to the period before this Court recognized the independent role of the federal courts under the Civil Rights Act to guarantee Constitutional rights. Rooker was decided almost half a century before that development; the opinion does not even mention the Civil Rights Act.

The position of the respondents in this case is that the doors of the federal courts should be closed whenever a state court has dealt with a matter, even if the thrust of the claim of the denial of Constitutional rights is the procedure before the state court. To carve out such an exception to the responsibility of federal courts to protect Constitutional rights means that, excepting for the processes of this Court by certiorari, there is no remedy for these denials of Constitutional rights. Such a position is inconsistent with the clear rulings of this Court. It certainly cannot be squared with the holding or the following comment in Mitchum v. Foster, 407 U.S. 225, 240 (1972):

> "It is clear from the legislative debates surrounding passage of §1983's predecessor that the Act was intended to enforce the provisions of the Fourteenth Amendment 'against state action, ... whether that action be executive, legislative, or judicial.' (Emphasis by this Court.)

And the argument that certiorari to this Court is an adequate protection against state court denial of Constitutional rights can hardly be squared with this Court's statement in England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 416, that:

> "[E]ven when available by appeal rather than only by discretionary writ of certiorari, [that possibility] is an inadequate substitute for the initial District Court determination ... to which the litigant is entitled in the federal courts."

In any event, Rooker and more recent cases which seek to apply a res judicata doctrine to civil rights actions are clearly distinguishable from this case in that here the Constitutional issue focuses upon the procedures of the very tribunal whose determination is claimed to be immune from scrutiny. Rooker, by contrast, involved a Constitutional determination by a state court having nothing to do with its own procedures. The same generally holds true for the other cases. It is this feature which on principle must serve to prevent the doctrine of res judicata from giving absolute finality to the state court's determination. Aside from the

fact that the possibility of review by certiorari before this Court is not an adequate remedy in any case (England, supra), it is particularly inadequate where the issue is the adequacy of the procedures below. In such a situation, if the matter is taken to this Court directly from the state court (as attempted here), this Court will not have the benefit of an unbiased opinion of the validity of the procedures below (as occurred here). Such an opinion could only be rendered by an independent tribunal -- the United States District Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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